IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-702

RALSTON PURINA COMPANY,
Petitioner,

vs.

NABISCO, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Petitioner has asked this Court to grant certiorari in this breach of contract case because the Eighth Circuit supposedly exceeded the proper scope of appellate review. Petitioner does not contend that this dispute involves any fundamental unsettled legal principles warranting this Court's attention, nor does it assert that the decision below conflicts with any ruling of this Court or of any other Circuit. Rather, the only question raised by the Petition, which is hardly of earth-shaking significance, is whether the Court of Appeals erred in holding as a matter of law that the guaranty in issue was ambiguous and in ruling that there was no evidence to support the jury's interpretation of it.

STATEMENT OF THE CASE

Petitioner Ralston entered into a contract with respondent Nabisco's wholly-owned and financially responsible subsidiary, Freezer Queen Foods, Inc., in which Freezer Queen agreed to buy a food processing plant in Wellston, Ohio, from Ralston if certain express conditions were met. The Ralston-Freezer Queen contract contained an arbitration clause. Freezer Queen was to pay approximately $1 million at closing and, as the remainder of the consideration for the contract, agreed to assume approximately $8 million of Ralston's lease and bond obligations with respect to the plant. At the last moment, Ralston requested Nabisco to guarantee the obligations to be assumed by Freezer Queen in the transaction. Accordingly, Nabisco's counsel dictated a two-paragraph letter, stating in pertinent part as follows:

> "This will serve to confirm our mutual understanding and agreement that as long as Freezer Queen Foods, Inc., is a wholly-owned subsidiary of Nabisco, Inc., Nabisco, Inc., *will guarantee the performance by Freezer Queen Foods, Inc., of its obligations* arising out of the agreement between Freezer Queen Foods, Inc., and Ralston Purina Company of even date *with respect to Ralston Purina Company's Wellston, Ohio, facilities.*" (Emphasis added.)

When that letter was tendered to Ralston's president, he immediately stated that it was "unsatisfactory," and Ralston's counsel promptly wrote "needs to be revised" across the face of the letter. Several times thereafter, Ralston expressly requested that a satisfactory guaranty be delivered at closing. However, Freezer Queen subsequently charged that Ralston had failed to comply with two conditions precedent to Freezer Queen's duty to buy the plant and therefore refused to close the transaction. Hence, a "satisfactory" guaranty was never prepared.

Following its disposal of the plant to another company, Ralston decided to forego arbitration against Freezer Queen in New York and instead proceeded directly against Nabisco in St. Louis on the so-called guaranty letter. After discovery, Nabisco filed a motion for summary judgment contending that the guaranty letter did not reflect a meeting of the minds of the parties and further arguing that even if the guaranty had been accepted, it did not encompass the duty to close, which Freezer Queen had allegedly breached. The trial court denied the motion and ordered the case to be tried. Again at the outset of the trial, counsel for Nabisco urged the court first to take evidence on the contract issues so as to avoid the "monumental waste of time" involved in trying the issues concerning the alleged breach by Freezer Queen of the underlying contract. Again, however, Nabisco's suggestions were summarily rejected.

On the disputed issue of the scope of the guaranty, the trial court determined that the guaranty letter was ambiguous because it did not specify what "obligations" were to be guaranteed. Even though there was no conflict in the extrinsic evidence, the district court, over Nabisco's objection, permitted the jury to determine the meaning of the guaranty letter. The evidence showed that the only contemporaneous written document referring to a guaranty suggested that Nabisco should guarantee "the various *obligations assumed* in this transaction by Freezer Queen." The only "obligations assumed" were the lease and bond obligations to be assumed by Freezer Queen if and when the transaction was closed. Furthermore, the Nabisco Board had authorized only a guarantee of Freezer Queen's "obligations under said lease and related water service and sewer service agreements." Ralston's house counsel and chief contract negotiator admitted on the witness stand that at no time had Ralston ever asked for any guaranty that the transaction would be closed. Nevertheless, the jury, as part and parcel of a demonstrably biased verdict, found that Nabisco had agreed to guarantee the closing.

The Court of Appeals, having scoured the record for evidence to support the jury's verdict, found none. After holding the guaranty to be ambiguous, the Court applied the traditional rules of appellate review and set aside the jury's verdict as being completely unsupported by the evidence. Judge Van Oosterhout filed a "dissenting" opinion in which he essentially concurred in the result but would have held that there was no meeting of the minds between the parties on the guaranty and, hence, no need to construe the guaranty letter.*

REASONS WHY THE WRIT SHOULD BE DENIED

I

Despite the vehemence of the Petition, this case involves the routine performance by the Court of Appeals of its duty to rectify an injustice caused by a jury which went astray. The Petition presents nothing more than an issue concerning the sufficiency of the evidence. There are no concepts of overriding importance in this lawsuit. The Court of Appeals, applying universally accepted precepts, simply held as a matter of law that the guaranty letter was ambiguous and that all of the surrounding circumstances and relevant evidence compelled a conclusion contrary to that reached by the jury. It is difficult to understand how Ralston can quarrel with the Court of Appeals' analysis in view of its own house counsel's admission on the witness stand that Ralston never even asked for a guaranty that the contract would be closed.

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* Although three judges dissented from the denial of rehearing en banc, it is only a matter of conjecture whether they would have voted to uphold the jury's verdict or to adopt the opinion of Judge Van Oosterhout. If certiorari is granted, respondent will urge that the result below is supported by the reasoning of Judge Van Oosterhout's opinion as well as by that of the majority opinion.

Petitioner erroneously states at page 17 that the guaranty should have been "strictly construed against the party seeking to limit its scope." Under the applicable New York law, the liability of a guarantor is *strictissimi juris*, and his obligation cannot be extended by implication beyond the precise words used. *100 Parkway Road v. Johns-Manville, Inc.*, 14 N.Y.S. 2d 830 (App. Div. 1939), *aff'd* 34 N.E. 2d 906 (1941). A guaranty "is to be strictly construed against the party for whose benefit it is given in the guarantor's favor." *Coburn Corporation of America v. Orr*, 304 N.Y.S. 2d 345 (1969), *Schlem v. Jesaitis*, 37 N.Y.S. 2d 943 (1942). But this case does not turn on canons of construction, for whatever rules are applied, the Eighth Circuit's resolution of the question is unassailable.

II

In an attempt to inject some color into an otherwise pallid legal dispute, petitioner, at pages 21-24 of its Petition, challenges the propriety of a portion of the Court of Appeals' original opinion which was deleted in response to Ralston's petition for rehearing (See Pet. A-24-25). The Court of Appeals did not hold that an obligee must first proceed against an obligor before pursuing the guarantor. Nor did it hold that Nabisco is now entitled to arbitration even though it had consciously chosen to have a court of law, rather than an arbitrator, determine the extent of its obligation to Ralston. The Court simply held that the duty allegedly breached by Freezer Queen was not guaranteed by Nabisco. Therefore, since Ralston has no claim against Nabisco, the Court observed that petitioner is relegated to proceeding against Freezer Queen, presumably in arbitration. Apart from the fact that Ralston has mischaracterized even the original opinion of the Court of Appeals, it is clear that the language of that opinion which Ralston challenges here was excised from the panel's modified opinion at the urging of Ralston.

The inescapable reality of this case, evident from the outset, is that petitioner proceeded against the wrong party in the wrong forum. The district court's repeated refusal to acknowledge that fact was properly corrected by the Court of Appeals, and its opinion presents nothing of substance for this Court to review.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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